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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 509.

THE H. ROUW COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

PETITION [redacted] FOR REHEARING AND MOTION TO JOIN OR SUBSTITUTE PARTY PLAINTIFFS.

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PETITIONER'S MOTION FOR REHEARING AND MOTION TO JOIN OR SUBSTITUTE PARTY PLAINTIFFS.

The United States Department of Agriculture publishes daily wholesale market reports and quotations on information from the principal markets of the United States. This report of January 16, 1959, reflects that there was unloaded approximately 2500 rail and truck shipments at 38 of the principal markets in the United States on that date. This is a typical average day for off-season shipments. These shipments consisted of apples, beans, broccoli, cabbage, carrots, cauliflower, celery, corn, cucumbers,

grapefruit, grapes, lemons, lettuce, mixed citrus, mixed vegetables, onions, pears, peas, peppers, potatoes old and new, sweet potatoes, tangerines and tomatoes. On May 20, 1958, during the heart of the fresh fruit and vegetable season, there were over 6,000 shipments unloaded. This would be a typical average day during the season, and the commodities received in May that are not normally received in January in addition to the ones above mentioned are asparagus, cantaloups, cherries, escarole, peaches, radishes, spinach, strawberries, turnip ruta and watermelons.

The record reflects, and it is common knowledge, that shipments of the commodities above described are received from the growing areas and are marketed on the wholesale markets by two principal means. Of course, practically all of such shipments are sold on the market floor in the usual bargaining method—the buyers come to the market and after negotiations with the seller, purchase the quantity desired at the price agreed upon. But as a result of the majority opinion of the Circuit Court the relationship between the producer-shipper and the wholesale market must be examined because it has a direct effect on each one of those shipments.

There are two principal relationships between the producing area and the wholesale market in the marketing of fresh fruits and vegetables. One is the large organization that does either its own farming and shipping or purchases outright a shipment from the producing area and sells the shipment on the wholesale market by himself or by salaried employees. The other method is the small operator, the farmer-shipper, that does not have its own selling organization on the market, and it either sells the shipments outright to the wholesale dealer or ships them to a commission merchant to sell on the wholesale market.

The commission merchant is an indispensable outlet and is a common method of handling perishables, since such shipments must be sold without delay and without this outlet, the small farmer-shipper without its own employees on the wholesale market would be at the mercy of the wholesale buyers.

It is elementary that the commission merchant assumes definite obligations upon receiving such a shipment but simultaneous with the assumption of such obligations the commission merchant receives an interest in the shipment.

Basically however, in the one type shipment you have only one party interested in the shipment and damages resulting from carrier mishandling, and in the other type shipment you have the shipper and commission merchant interested in the shipment and the damages resulting from carrier mishandling.

This Court has stated in the *Crail* case (*Illinois Central R. Co. v. Crail*, 281 U. S. 57, 50 S. Ct. 180, 74 L. Ed. 699, 67 A. L. R. 1423), that the wholesale market value was the basis for computing loss or damages to shipment resulting from carrier mishandling. The plaintiff in the Crail case was a destinaton receiver that bought coal wholesale at the mine and retailed it at the destination market, and since those sales were at retail prices, it sought recovery of damages based on the retail price resulting from coal being lost in transit. This Court held of course that the wholesale value was the basis to be used. The petitioner has no quarrel whatsoever with the Crail case. The petitioner filed suit for damages based on the wholesale value. The trial court awarded damages based on the wholesale value, but the majority opinion of the Circuit Court held that there must be a deduction from the wholesale value,

and in effect that this deduction would be based upon the farmer-shipper's contract with the commission merchant.

If the plaintiff in the present case were a large organization that did its own farming, shipping and selling upon the wholesale market or purchased shipments outright from the producing area and sells the shipments on the wholesale market by salaried employees, there could not possibly be such a contract and there could not possibly be such a deduction from the full actual loss to the property. The fact that damages recoverable on shipments marketed under the farmer-shipper and commission merchant relationship will be less than those recoverable under the other type of relationship will result in a great disadvantage to the farmer-shipper and commission merchant in competing with the large organization and will in all probability effect a change in the industry to the extent of destroying the small farmer-shipper by destroying his method of marketing. It hardly needs to be pointed out that the best crop of tomatoes in the field would have no value in the absence of a method of marketing such crop on the principal wholesale markets.

There must be a uniform, fair and equal application of the Transportation Act, and particularly the Carmack Amendment, Title 49, U. S. C. A. 20 (11). Since the majority opinion of the Circuit Court has departed from all existing law, then it must, to be sound law, unquestionably satisfy the requirement of the uniform, fair and non-discriminatory application particularly when the Transportation Act and the Carmack Amendment are applicable, and certainly there should be no property right destroyed without due process of law.

An examination of two typical shipments will clearly show without any doubt that the reasoning of the majority

opinion will not lead to uniform and fair application of the Carmack Amendment, but will in fact lead to a very extreme discriminatory application.

The farmer-shipper ships a carload of tomatoes to market to be sold on the wholesale market by a commission merchant. The carrier's negligence damages the shipment to the extent of $100.00, based on the difference in the reasonable wholesale value shipment would have had but for the negligence and its wholesale value as a result of the negligence.

A large organization that does its own farming, or one that purchases a shipment outright and has its own employees to sell its merchandise on the wholesale market also receives a shipment of tomatoes to be sold on the wholesale market. This shipment is also damaged by carrier negligence to the extent of $100.00, based on the same measure as the shipment of the farmer.

Each shipment is shipped under the same type uniform domestic straight bill of lading contract, each shipment controlled by the Carmack Amendment, the shipments could originate at the same origins, travel on the same train and go to the same destination market.

According to the majority opinion of the Circuit Court the carrier liability on the first shipment would be $100.00, less the interest of the commission merchant. This interest may be 8%, 10% or 15%, whatever is agreed upon. As a result the recovery would be $92.00, $90.00 or $85.00.

The large organization pays its employees a monthly salary to sell its shipments, and as a result there is no interest of the commission merchant to be deducted, and the carrier liability to this shipment of tomatoes would be $100.00.

That such a difference in recovery is so obviously unfair and discriminatory that it should require no other statement for this Court to recognize that a great wrong has been done. This wrong was done by the majority opinion of two judges in the Circuit Court. The opinion of these two judges is in conflict with the opinion of the Chief Judge of the Circuit Court and the District Judge of the Federal Court. It is further in conflict with two recent Texas Appellate Court decisions of three judges of the Court of Appeals and of nine judges in the Supreme Court of Texas. Thus 14 judges, including two Federal judges, disagree with the majority opinion of the two judges of the Fifth Circuit Court.

The majority opinion of the Fifth Circuit Court attempts to justify its reduction of carrier liability on the grounds that the farmer or petitioner was bound to pay such interest to the commission merchant had the shipment arrived free of carrier negligence, and as a result it would be more than indemnity to allow the farmer or petitioner to recover the full actual loss to the property of $100.00. Certainly the farmer or petitioner would have been bound to pay the commission merchant had the shipment arrived in good condition because the commission merchant had a vested interest in the shipment, and by exactly the same token the commission merchant has a vested interest in the recovery of damages. This is exactly where the majority opinion of the Circuit Court has fallen into error. It has recognized this interest had shipment been free of damage but it refuses to recognize this interest after shipment has been damaged. In effect the majority opinion holds that the carrier's wrongdoing destroys the property right and interest of the consignee commission merchant.

The trial court tried the case exactly as Congress had directed and rendered a judgment for the full actual loss to the property. Congress has expressly given the right to any party entitled to recover on a cause of action of this nature to recover the full actual loss to the property. 49 U. S. C. 20 (11). For the principal reason of avoiding a multiplicity of action, since in every shipment there is a consignor-consignee relationship with the contract of carriage with the carrier, both are parties to the contract and either has the right to maintain the action.

The record shows there is a great public interest in the question before the Court. Thousands of shipments of perishables are marketed annually by commission merchants.

If the majority opinion of the Circuit Court is not reversed it will have the effect of allowing a discrimination of the worst sort in that the freight charges on shipments marketed by commission merchants will be more than the charges on shipments without this relationship since the carrier on this type shipment would recover not only the freight charges allowed by the tariff but in addition thereto, on damaged shipments, the interest of the commission merchant. (The carrier could, as a result of the majority opinion, convert a shipment to its own use and assuming that shipment had the wholesale value of $5,000.00 and that the commission merchant's interest was 10%, the carrier's liability would be, under the common law rule, $5,000.00 less freight charges of about $700.00, for the net amount of $4,300.00, but under the majority opinion the carrier's liability would be $5,000.00 less freight charges of about $700.00, less the consignee commission merchant's interest of 10%, or $500.00, for the net amount of $3,800.00.) The Transportation Act was designed to prevent discrimination of any sort, not to be used as a tool

to allow discrimination. The Elkins Act makes it a serious criminal offense for a carrier to favor any one over the other or to collect freight charges in an amount more than the tariff. If the act of a third party were to have the effect of the Circuit Court majority opinion, it would be in effect compounding a crime and certainly the Circuit Court is opening the door to allow the carrier to justify a violation of the Elkins Act. It would be impossible to conjure such a deduction from the full actual loss to the property as has been done by the majority opinion in the present case on a shipment to a large organization that does its own farming and has its own employees to sell its merchandise on the wholesale market, paying them a salary for such services whether the shipment was damaged or not.

This Court has previously stated that new parties could be brought into the action at any stage of the action, particularly when not to do so would run counter to effective judicial administration. *Mullaney* v. *Anderson*, 342 U. S. 415. Accordingly this petitioner moves this Court for the right to join as Party Plaintiffs the consignee-commission merchants of the shipments involved, or in the alternative the right to substitute the consignee-commission merchant as plaintiff in this action. This Court may consider this a drastic motion, but it isn't. The consignee-commission merchant is in fact a party as interested in this action as the petitioner, the only difference being the extent of the interest. But this petitioner is convinced that the complete fallacy of the opinion of the Circuit Court will be so obviously apparent with the consignee-commission merchant as either a party plaintiff or sole plaintiff that this Court will readily grant this motion for rehearing in all things.

This Motion does not represent a changed or a new position of the petitioner. The petitioner has never denied the interest of the commission merchant in these shipments nor in the recovery of damages to these shipments. The bill of lading contract requires a claim to be filed with the carrier before suit can be filed. This claim was filed by petitioner on behalf of both the petitioner and the consignee commission merchant. This is in the record at Pages 83 and 84. The attorney for respondent was questioning Mr. Buel, the office manager for the petitioner, and the question and the reply thereto was as follows:

"Q. Now, reverting to the Strazzulla Brothers Company in Boston, on these first ten cars here in Cause 981, Mr. Buel, on your original claim that was filed on those first ten counts, it was, in each of the first ten counts, the claim was filed on behalf of H. Rouw Company and Strazzulla Brothers Company, likewise. Why was the Strazzulla Brothers Company included as a claimant in that claim that was presented?

A. Because they are considered as a party interested in the claim for any shipment that they might handle with us other than a shipment that they might buy on an f.o.b. basis or outright delivered basis or some feature like that where it becomes their sole property, but if it is a joint account shipment or on a consigned basis, why, we consider they have, and they do have, an interest in it.

Q. Well, now, these first ten counts here in this Cause 981, they were all handled on a consignment basis, where Strazzulla Brothers charge a flat eight per cent commission on the amount that each car brought. Where would they have an interest in any recovery on those cars, Mr. Buel?

A. Well, first of all—

Mr. Little: I object to that. It is asking for a legal conclusion, it seems to me. Off the record there a minute—

(Discussion off the record.)

A. We worked with these people in—as previously stated, in several manners. Sometimes they will advance us funds in connection with a deal. Sometimes we draw accommodation drafts on them. They advance money to pay the freight, transportation charges, and accept all responsibilities of paying any items of charges that accrue against the shipment, in the handling of same at Boston, and certainly if they put up this kind of money in connection with those shipments, they certainly have an interest in the shipment, to get their funds back out of it."

The majority opinion of the Circuit Court as first presented stated in the opening sentence:

> "This appeal presents the question of the correct measure of damages which should be allowed the *owner* of an interstate shipment of perishables damaged by the negligence of a common carrier by rail."

The petitioner pointed out in its motion for rehearing in that Court that this statement was in direct conflict with the Carmack Amendment provision that states that the carrier "shall be liable to the lawful holder of the bill of lading contract *or any party entitled to recover thereon* * * *", and that the ownership was vested in both the shipper consignor and the consignee commission merchant. The two judges writing the majority opinion then made their one modification of the original opinion and stated that the rule would apply to the owner "or anyone entitled to recover", inserting the words "or anyone entitled to recover" after the word "owner" in the first sentence. Thus we make this motion to join as Party Plaintiff, or even substitute as Party Plaintiff, the consignee commission merchant, and with the consignee commission merchant as plaintiff attempt to apply the reasoning of the majority opinion.

The law is clear that on an action of the nature of the one here presented—either the farmer consignor petitioner or the consignee commission merchant could maintain the original action.[1]

To apply, then, the opinion of the two-judge majority of the Circuit Court to this action with the consignee commission merchant as the plaintiff—observe, if you will, the result.

The two-judge majority opinion held it would be unjust enrichment to allow recovery of full actual loss to the property.

Would it be then, that the consignee commission merchant could only recover its interest or only recover the interest of the farmer shipper?

If the recovery is the same as the two-judge majority has allowed—then it would be the full actual loss to the property, less the plaintiff consignee commission merchant's interest—or THE CONSIGNEE COMMISSION MERCHANT COULD MAINTAIN THE ACTION BUT COULD NOT RECOVER ITS INTEREST.

If the reasoning as distinguished from the recovery is the same as the two-judge majority has reasoned—then it would be that it would be unjust enrichment for the consignee commission merchant to recover the full actual loss,

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1. *St. Louis, I. M. & S. R. Co.* v. *Starbird*, 243 U.S. 592, 61 L. Ed. 917; *Edgerton* v. *Chicago, R. I. & P. R. Co.*, 240 Ill. 311, 88 N.E. 808, S. Ct. Ill. 1909; *Thompson* v. *H. Rouw Company*, (Tex. Civ. App.) 237 S.W. 2d 662; *Texas & New Orleans Railroad Co.* v. *The H. Rouw Company*, (Tex. Civ. App.) 271 S.W. 2d 666; *Terry* v. *Pennsylvania Railroad Company*, 156 Atl. 787 (S. Ct. of Del. 1931); *Collins et al.* v. *Denver & R. G. Ry. Co.*, 167 S.W. 1178 (K. C. Ct. of App., 1914); 13 Corpus Juris Secundum, Carriers, Paragraph 249(k).

since the consignee commission merchant was bound to pay the shipper farmer its interest that it would have received had shipment arrived in good condition. With this reasoning the recovery would be limited to 8%, 10% or 15%, whatever the commission interest happened to be.

This Court has recognized the following principle in connection with shipments of the nature of the ones here involved, that: The ownership of the property damaged is of no concern to the carrier in a suit between carrier and holder of the bill of lading contract (*Pennsylvania Railroad Co.* v. *Olivit Bros.*, 61 L. Ed. 908, 243 U. S. 574, decided April 30, 1917), that a commission merchant can maintain the action for damages (*St. Louis, I. M. & S. R. Co.* v. *Starbird*, 61 L. Ed. 917, 243 U. S. 592), that a commission merchant can sue for overcharges, in fact has a duty to sue for such charges, and the carrier wrongdoer has no right to concern itself with the subsequent settlement of interest between the consignor or consignee (*George J. Adams et al.* v. *Ogden L. Mills, Director General et al.*, 76 L. Ed. 1184, 286 U. S. 397), that a commission merchant can be held responsible for freight charges even after he has settled with the consignor (*N. Y. C. & Hudson River Railroad Co.* v. *York & Whitney Co.* and *York & Whitney Co.* v. *N. Y. C. & Hudson River Railroad Co.*, 65 L. Ed. 1016, 256 U. S. 406), that the consignee commission merchant is a party to the bill of lading contract (*Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Alvin J. Fink*, 63 L. Ed. 1151, 250 U. S. 577, and *Pennsylvania Railroad Company* v. *Titus*, 109 N. E. 857). In view of these fundamentals, the opinions of the Texas Courts in *The Texas and New Orleans Railroad Company* v. *The H. Rouw Company*, 271 S. W. 2d 666 and *Thompson* v. *The H. Rouw Company*, 237 S. W. 2d 662, is the correct law and that the petitioner is under the same duty as was the com-

mission merchant, as stated by Judge Brandeis in the Adams case to "resist illegal exactions", or in terms of the present case resist the deduction of the interest of the consignee of the shipments herein involved. There will be no unjust enrichment nor will the petitioner receive more than indemnity after it has made a settlement with the consignees. Furthermore, the petitioner's motion to join or substitute party plaintiffs should conclusively demonstrate the fallacy of the conclusion of the majority opinion of the Circuit Court of unjust enrichment or more than indemnity.

CONCLUSION AND PRAYER.

Wherefore Petitioner prays that this Honorable Court grant Petitioner's Motion to Join or Substitute Party Plaintiffs herein, and Petitioner further prays that this Motion for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be in all things granted.

Respectfully submitted,

Sawnie B. Smith,

SAWNIE B. SMITH,
Edinburg, Texas.

SAWNIE B. SMITH AND
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Of Counsel.

CERTIFICATE OF GOOD FAITH.

The Petitioner herein, by its attorney, hereby certifies that the foregoing Petition for Rehearing is not presented for the purpose of delay or vexation but is, in the firm opinion of counsel, well and correctly founded in law and proper to be filed and considered herein.

Dated this 28th day of January, 1959.

Sawnie B. Smith

SAWNIE B. SMITH.

CERTIFICATE OF DELIVERY.

I certify that a copy of the foregoing Motion for Rehearing and Motion to Join or Substitute Party Plaintiffs has been forwarded by United States mail to the attorney for the respondent, Harry L. Hall, of Strickland, Wilkins, Hall & Mills, of Mission, Texas.

Sawnie B. Smith

SAWNIE B. SMITH.

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